SERVED: May 22, 1995

NTSB Order No. EA-4367

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 19th day of May, 1995

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. ALASKA ISLAND AIR, INC., Respondent.	Docket SE-13881

ORDER DENYING RECONSIDERATION

By NTSB Order No. EA-4360, served May 12, 1995, the Board granted the Administrator's motion to dismiss the respondent's appeal as an untimely attempt to obtain Board review of an order of the law judge terminating the case pursuant to a settlement agreement. On the same date, the respondent filed a petition asking that we reconsider that dismissal, arguing that the Board erred (1) in not deciding the case on the basis of a motion to dismiss that the respondent had filed and (2) in assuming that respondent's owner was aware, within the 10-day period for appealing to the Board from the law judge's termination order, that the settlement agreement did not contain certain assurances he had wanted in it concerning respondent's renewal of its 401 certificate services after the suspension of its Part 135 certificate.[1] Because we find, for the reasons discussed below,

[1]The speed with which respondent filed for reconsideration

no merit in either argument, the petition will be denied.

In our original order we did not rule on a motion to dismiss the Administrator's complaint that the respondent filed after the time for appealing from the law judge's termination order had expired. Respondent argues that we erred in not ruling on that motion, which sought to contest the Administrator's authority to prosecute the alleged violations on the ground that public aircraft were involved, because Section 821.17(d) of our Rules of Practice, 49 CFR Part 821, states that such a motion will be entertained "at any time." Respondent's argument is not well taken. Rule 17(d) provides that: "A motion to dismiss on the ground that *the Board* lacks jurisdiction may be made at any time" (Emphasis added). Since respondent wanted to challenge the Administrator's jurisdiction, not the Board's, the rule, by its express terms, was not applicable.[2] This does not mean, of course, that the allegation that the Administrator lacked jurisdiction to pursue the charges at issue could not have been raised on a timely appeal to the Board. It means only that the Board was not obligated to decide that question in determining whether the respondent's failure to file a timely appeal was excusable.

Respondent's second argument fares no better. We did not, as respondent claims, assume that respondent's owner-president knew, within the time for appealing from the law judge's termination order, that written assurances concerning Alaska Island Air's 401 certificate were not part of his company's

(..continued)
suggests a belief that such a petition operates to stay both the order dismissing its late appeal and whatever obligations it agreed to in the settlement agreement. We are doubtful that it does, for any suspension respondent may be obligated to serve stems from the settlement agreement, not from any order of the Administrator that the Board has reviewed. The law judge's order did no more than terminate the respondent's appeal to this agency from the Administrator's order of suspension; it did not represent a judgment on the settlement agreement itself. Thus, even if the respondent had timely sought to have the law judge or the Board undo the termination order, it is far from clear to us that the agreement, over the Administrator's objection, could or would have been voided.

[2]Moreover, even as to a motion to dismiss that places the Board's jurisdiction in issue, the rule is intended only to carve an exception from the general requirement, in Section 821.17(a), that a motion to dismiss be filed "within the time limitation for filing an answer," not to authorize the filing of a motion to dismiss after an appeal has been litigated and is no longer pending before the agency.

settlement agreement with the Administrator.[3] We made no assumptions concerning what the respondent's *owner* knew or wanted and do not know when he may have first actually read the settlement agreement. Our analysis, rather, focussed on evidence establishing knowledge properly chargeable to the respondent. In this connection, we noted, without specifically referencing, information contained in one of the affidavits respondent submitted to us in support of its motion to have the settlement agreement set aside. It was there stated, by an aviation consultant respondent's law firm had employed, that on March l respondent's owner, Michael Spisak, had asked him whether he had obtained written assurances "that the FAA would not resist Alaska Island Air's return to normal operations at the end of the agreed upon thirty (30) day suspension of its Part 135 certificate and, further, that the FAA would not provide negative reports to the Department of Transportation pertaining to Alaska Island Air's 401 re-certification" (Affidavit of Glen C. Earls). The consultant further declared that counsel for the Administrator had on March l and 7 refused his requests for such assurances.

In light of the consultant's affidavit, the respondent's owner's assertion that he was unaware until March 13 that the settlement agreement signed by his company's attorney on February 28 did not contain the assurances he later claimed were crucial to his assent to a settlement strikes us as disingenuous. While he may not have actually read the agreement, he must have known that it did not contain his desired assurances, for on the very day the agreement was presented to the law judge Mr. Spisak questioned the consultant about his efforts to obtain them. In any event, it is clear that respondent's agents were well aware that the assurances were not in the agreement, and had not been provided separately, before the deadline (March 10) for appealing from the law judge's decision expired. Thus, the unlikely possibility that Mr. Spisak did not know of the essential content of the agreement when it was presented to the law judge or of the progress of ongoing, subsequent efforts to acquire the assurances from the FAA until after the 10th provides no justification for the carrier's delay until March 16 in seeking to have the law judge's order nullified.

The Administrator's memorandum in opposition to the petition for reconsideration requests that we clarify our prior decision to the extent that it does not speak to the status of the

[3]Although it is of no decisional significance here, it appears that the effort was not, as we described it in our original decision, to obtain written assurances from the FAA that the suspension of the respondent's Part 135 certificate would not affect its 401 certificate, but that the FAA would not oppose the return of such a certificate to the respondent after the Part 135 certificate suspension was over.

respondent's appeal from the Amended Order of Suspension that the Administrator issued pursuant to the settlement agreement, a request respondent does not oppose in its response to that memorandum. In our judgment, the appeal from that order should not be entertained. Under the settlement, respondent in effect agreed to accept a 30-day suspension of its certificate, to commence on May 15, if the Administrator would abandon an order seeking a 120-day suspension of that certificate. Thus, if respondent were allowed to appeal from the amended order of suspension, which provides for the lesser sanction, we would not only be indirectly allowing respondent to obtain Board review of charges it is no longer free to challenge here, given our dismissal of its appeal from the termination order, we would effectively be rewarding, at the Administrator's expense, the respondent's apparent decision to breach the settlement agreement. We decline to permit such an abuse of our process or to involve the Board, more deeply than it already arguably is, in the dispute over the validity of the settlement agreement.[4]

ACCORDINGLY, IT IS ORDERED THAT:

1. The petition for reconsideration is denied, and

2. The respondent's provisional request for a stay is denied.[5]

HALL, Chairman, FRANCIS, Vice Chairman, and HAMMERSCHMIT, Member of the Board, concurred in the above order.

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[4]For these same reasons, and assuming, *arguendo*, that our ruling here has any bearing on the parties' rights and obligations under the settlement agreement they negotiated, see fn. 1, supra, we will deny respondent's request, opposed by the Administrator, that we stay, pending court review, any decision denying its petition for reconsideration. Respondent should look to that forum for relief in that respect. Compare Administrator v. Crawford, NTSB Order EA-4293 (1994) ("Once an agreement is entered, and the Board's order dismissing the proceeding is administratively final, any remedy for breach of the agreement is to be had, if at all, in the courts", citing Administrator v. Hegner, 5 NTSB 148 (1985)).

[5]Respondent's unopposed request for leave to file a response to the Administrator's memorandum in opposition to the petition for reconsideration is granted.